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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte YOSHIHIRO OBA and SHINICHI BABA

Appeal 2009-006534
Application 10/761,347¹
Technology Center 2400

Decided: April 28, 2010

Before JOSEPH L. DIXON, JEAN R. HOMERE, and JAY P. LUCAS,
Administrative Patent Judges.

LUCAS, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ Application filed January 22, 2004. The real party in interest is Toshiba America Research, Inc. and Telcordia Technologies, Inc.

STATEMENT OF THE CASE

Appellants appeal from a final rejection of claims 1 through 3, 5, and 7 through 27 under authority of 35 U.S.C. § 134(a). The Board of Patent Appeals and Interferences (BPAI) has jurisdiction under 35 U.S.C. § 6(b). Claims 4 and 6 are objected to by the Examiner.

We affirm.

Appellants' invention relates to a communication tunnel between a client node and an access router through an access network, such that the client nodes sends and receives data packets from a serving network. (*See* claim 1.) In the words of Appellants:

When the client node 103 needs to send or receive data packets through a serving network, it establishes a secure tunnel (logical interface) using IP Security protocol (IPSec tunnel) to the access router of that serving network through the IP access network. Tunneling allows one network to send its data through another network's connections, and works by encapsulating a network protocol within packets carried by the second network.

(Spec. 6, bottom to 7, top).

Claim 1 is exemplary, and is reproduced below:

1. A method of dynamically connecting a client node to a serving network, comprising the steps of:

providing an access network to which a client node has a network connection;

providing at least one access router having a network connection to said access network and having a network connection to at least one serving network;

sending serving network provider advertising information to said client node;

receiving from said client node serving network provider information specifying a serving network to which said client node desires access; and

establishing a communication tunnel between said client node and said access router through said access network, such that said client node is able to send and receive data packets to and from the serving network specified by said client node within said communication tunnel through said access network.

In rejecting the claims on appeal, the Examiner relied upon the following prior art:

Forsl�w	US 2002/0069278 A1	Jun. 06, 2002
Sakov	US 2002/0196802 A1	Dec. 26, 2002
Boden	US 2003/0145104 A1	Jul. 31, 2003
		(filed on Jan. 23, 2002)
Le	US 2004/0019664 A1	Jan. 29, 2004

REJECTIONS

The Examiner rejects the claims as follows:

R1²: Claims 1, 2, 5, 9, 10, 13, 17, 18, 20, 21, and 25 through 27 stand rejected under 35 U.S.C. § 102(e) for being anticipated by Boden.

R2: Claim 3 stands rejected under 35 U.S.C. § 103(a) for being obvious over Boden in view of Sakov.

R3: Claims 8, 11, 12, 14 through 16, and 19 stand rejected under 35 U.S.C. § 103(a) for being obvious over Boden in view of Forsl w.

R4: Claim 7 stands rejected under 35 U.S.C. § 103(a) for being obvious over Boden in view of Le.

Appellants contend that Boden does not anticipate the claimed subject matter, and that Boden in combination with Sakov, Forsl w, or Le does not render the claimed subject matter unpatentable because Boden fails to teach “establishing a communication tunnel between said client node and said access router,” as recited in claim 1 (App. Br. 8, middle to bottom). The Examiner contends that each of the claims is properly rejected (Ans. 4, top to 16, bottom).

We will review the rejections in the order argued, and as grouped in the Brief. The claims are as per Appellants’ Briefs. We have only

² Appellants contend that the Examiner’s rejection [R1] under 35 U.S.C. § 102(e) is a new grounds of rejection because a previous Office Action (filed on September 28, 2007) stated [R1] as being under 35 U.S.C. § 102(b) (*id.* at p.3, bottom) (App. Br. 13, middle to 14, middle). We treat the Examiner’s oversight as a typographical error. By failing to file a petition under 37 CFR § 1.181 within two (2) months of the Answer, Appellants have waived any allegation that the Answer contains an improper new ground of rejection. (*See* MPEP 1207.03 (IV).)

considered those arguments that Appellants actually raised in the Briefs. Arguments that Appellants could have made but chose not to make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

ISSUE

The principal issue before us is whether Appellants have shown that the Examiner erred in rejecting the claims under 35 U.S.C. §§ 102(e) and 103(a). The issue specifically turns on whether Boden teaches “establishing a communication tunnel between said client node and said access router,” as recited in claim 1.

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence.

Disclosure

1. Appellants have invented a communication tunnel between a client node and an access router through an access network, such that the client node sends and receives data packets from a serving network. (*See* claim 1.)

Boden

2. The Boden reference teaches communication link between a client node (*i.e.*, Node A1) and an access router (*i.e.*, VPN Gateway A) through an access network (*i.e.*, Network A), such that the client node sends and receives data packets from a network (Network B or Network C). (*See* Fig. 4, ¶¶ [0039] and [0073] to [0076].)

Sakov

3. The Sakov reference discloses multiple access routers connected via network connections to an original access network and multiple serving networks. (See ¶¶ [0029] to [0035].)

Forslöv

4. The Forslöv reference discloses authenticating clients before establishing IPSec secure communication tunnels in a wireless VLAN network that uses a Router discovery mechanism. (See ¶¶ [0093], [0094], and [0108].)

Le

5. The Le reference discloses using a PANA protocol to advertise network elements. (See ¶¶ [0039] to [0044].)

PRINCIPLES OF LAW

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006).

“In reviewing the [E]xaminer's decision on appeal, the Board must necessarily weigh all of the evidence and argument.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

“[R]ather than reiterate the positions of the parties in toto, we focus on the issue therebetween.” *Ex parte Nikoonahad*, No. 2006-3247, 2007 WL 1591636, at *2 (BPAI 2007).

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citation omitted).

Our reviewing court states in *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) that “claims must be interpreted as broadly as their terms reasonably allow.” However, “limitations are not to be read into the claims from the specification.” *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*).

“[T]he words of a claim ‘are generally given their ordinary and customary meaning.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (internal citations omitted). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Id.* at 1313.

ANALYSIS

From our review of the administrative record, we find that the Examiner presents his conclusions of unpatentability on pages 3 to 12 of the Examiner’s Answer. In opposition, Appellants present a number of arguments.

*Arguments with respect to the rejection
of claims 1, 2, 5, 9, 10, 13, 17,
18, 20, 21, and 25 through 27
under 35 U.S.C. § 102(e) [R1]*

Appellants argue: Boden fails to teach “between said client node and said access router,” as recited in claim 1, since Boden’s “tunnel is a VPN connection between access routers (or Gateways in Boden), and not [a VPN connection] between a client node and an access router.” (App. Br. 7). Boden’s tunnel resides outside of any of the access networks whereas the tunnel, as claimed, resides within an access network (*id.*).

We carefully considered the Briefs, the Examiner’s Answer, the cited portion of the Boden reference, and indeed the entire reference. We agree with the Examiner’s conclusions of unpatentability for the following reasons.

We find that Appellants have invented a communication tunnel between a client node and an access router through an access network, such that the client node sends and receives data packets from a serving network (FF#1). In comparison, Boden reference teaches communication link between a client node (*i.e.*, Node A1) and an access router (*i.e.*, VPN Gateway A) through an access network (*i.e.*, Network A), such that the client node sends and receives data packets from a network (Network B or Network C) (FF#2).

Exemplary claim 1 recites a method that includes, in relevant part, “establishing a communication tunnel between said client node and said access router.”

This dispute is mainly about claim interpretation. Appellants urge an interpretation of “tunnel” as a secure VPN (App. Br. 7). We reasonably but

broadly interpret claims (*In re Zletz*, cited above). Our claim interpretation starts with the common meaning of the terms. (*Phillips v. AWH Corp.*, cited above). If there is a special, narrower meaning, defined in the Specification, we will follow it. (*See id.*). Here, while the Specification provides numerous examples of tunnels, the Specification fails to provide a delimited, binding definition that is carried to the claims. We thus interpret Appellants' "communication tunnel" (claim 1) broadly as being an electrical data connection "between a client node and an access router," as claimed. We place no further limitation on what "communication tunnel" means, represents, or includes, since Appellants chose not to specifically limit the claimed "communication tunnel" in any way. Further, we find that a person of ordinary skill in the art would have recognized the claimed "communication tunnel" as being no more than an electrical data connection over which data packets are sent and received. Consequently, we find that Boden's teaching for a communication link (*i.e.*, an electrical data connection) between said client node and said access router (FF#2) is sufficient to meet Appellants' claim limitation "establishing a communication tunnel between said client node and said access router."

To be clear, we do not read Appellants' claim language as being so narrowly defined as to include only a "secure tunnel" or only a "Virtual Private Network tunnel," as disclosed in the Specification. (*See Spec. 6*, bottom to 7, top.) To construe the claims in such a manner would involve impermissibly reading limitations from the Specification into the claims. (*See In re Van Geuns*, cited above.) Accordingly, we find no error in the rejection [R1] of claim 1.

*Arguments with respect to the rejection
of claims 3, 7, 8, 11, 12, 14 through 16, and 19
under 35 U.S.C. § 103(a) [R2 to R4]*

Appellants choose not to argue the Examiner's findings regarding the secondary references (*i.e.*, Sakov, Forsl w, and Le) (App. Br. 13, middle). Rather, Appellants merely contend that "these secondary references fail to correct the deficiencies of Boden et al. noted above with respect to claim 1." (*Id.*). Contrary to Appellants' argument regarding Boden's deficiencies, we found above that the Boden reference meets the argued limitations of claim 1. (*See supra.*) Since no separate arguments were made regarding claims 3, 7, 8, 11, 12, 14 through 16, and 19 (App. Br. 13, middle), we find no error in the Examiner's rejections [R2 to R4].

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that the Examiner did not err in rejecting claims 1 to 3, 5, 7 through 27.

DECISION

We affirm the Examiner's rejections [R1 to R4] of claims 1 through 3, 5, 7 through 27.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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peb

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